

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1292

ADOPTION OF GAIA
(and a companion case¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After trial, a judge of the Juvenile Court found the mother unfit to parent her two children, Gaia and Nico, terminated her parental rights, and ordered limited posttermination contact between the mother and the children.² On appeal, the mother contends that the judge abused her discretion in terminating her parental rights because the judge ignored much of the evidence favorable to the mother and found her to be unfit due to mental health issues without any nexus to her parenting abilities. She also contends that the judge abused her discretion in granting her only one supervised visit per year with the children posttermination. We affirm.

¹ Adoption of Nico. The children's names are pseudonyms.

² The father of Nico filed a surrender of parental rights on the second day of trial. The paternity of Gaia was never determined, and the parental rights of her "unknown/unnamed father" were terminated. Neither father is involved in this appeal.

Background. In January, 2016, the police conducted a raid on the home where the mother, the father,³ and the children were living; the children (ages four months and two and one-half years at the time) were present during the raid, in which the police recovered cocaine, marijuana, and various drug paraphernalia. Subsequently, the Department of Children and Families (department) filed this care and protection petition,⁴ pursuant G. L. c. 119, § 24, and obtained emergency temporary custody of the children. Both children were placed with Nico's paternal aunt and her boyfriend as foster parents, where they remained.

During the pendency of the proceedings, the mother was assigned a service plan which included tasks to address apparent issues of domestic violence and mental health. She engaged inconsistently in these services. Against department advice, the mother maintained a relationship with the father, which was marred by violence and resulted in the mother sustaining serious injuries, including a bloody nose, a black eye, and, just one month before trial, a kick in the abdomen while pregnant with

³ All references to "the father" are to the father of Nico.

⁴ By that time, the family had been the subject of a number of reports pursuant to G. L. c. 119, § 51A, alleging domestic violence between the mother and the father, as well as neglect of the children.

another child.⁵ The mother's visits with the children were marked by emotional outbursts including the mother's threats to kill the father and the children, the mother's threats to kill herself in front of the children, and the mother's physical assault against the father, which was witnessed by the children.

The mother did not attend the trial, which took place on May 4, 2017, and June 8 and 16, 2017.

Discussion. 1. Termination of parental rights. To grant a petition terminating a parent's legal rights, "[t]he judge must find by clear and convincing evidence that a parent is presently unfit to provide for the welfare and best interests of the child." Adoption of Mary, 414 Mass. 705, 710 (1993). Upon review, "our task is not to decide whether we . . . would have made the same decision, but to determine whether the trial judge abused his discretion or committed a clear error of law." Adoption of Hugo, 428 Mass. 219, 225 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999). "In recognition of the trial judge's superior position to evaluate witness credibility and weigh the evidence, we review her findings with substantial deference." Adoption of Cadence, 81 Mass. App. Ct. 162, 166 (2012).

⁵ That child is not involved in these proceedings.

a. Favorable evidence. The mother first contends that the judge's findings are not entitled to deference because the judge failed to consider or properly weigh positive evidence of her parenting before and after the children were removed. Contrary to this assertion, the judge's detailed factual findings demonstrate careful attention to all evidence, including that which was favorable to the mother.

With respect to the time period before the children's removal from the mother's care, the judge's findings explicitly acknowledged that "prior to the removal, Mother appeared to adequately care for her children's physical needs." The judge also noted that the children were dressed appropriately at the time the emergency response workers responded to the home shortly before the children were removed. Much of the mother's argument regarding positive evidence that the judge failed to properly consider centers on conditions that no longer existed at the time of trial. For example, the mother points out that, prior to the removal of the children, she had obtained employment and lived in a clean apartment with working utilities and sufficient clothing, toys, and food for the children. By the time of trial, however, the mother was homeless and without any means of financial support. Given that the critical inquiry is parental fitness at the time of trial, the judge appropriately gave limited weight to the conditions that existed

prior to the removal of the children. See Adoption of Diane, 400 Mass. 196, 204 (1987) ("most recent information" about parental fitness is determinative).

The mother also argues that the judge ignored positive facts regarding her visits with the children after they were removed from her care, including that she was appropriate and nurturing with them, that she was calm and effective, and that she played with the children and comforted them. However, again, the judge's factual findings specifically show that such positive evidence was weighed. The mother herself concedes that the judge's findings acknowledge that the mother consistently and timely visited the children and called weekly to confirm the appointments, that she cared for the children effectively during visits and provided them with food and other care items, that she was sober during her interactions with the children, and that the children smiled and responded well while interacting with the mother. These findings by the judge are precisely the type of favorable evidence that the mother claims was ignored.

Acknowledging the positive attributes of the mother's parenting both before and after removal, the judge nonetheless determined that those factors were far outweighed by other evidence supporting the mother's unfitness. See Custody of Eleanor, 414 Mass. 795, 799 (1993) (presence of conflicting evidence does not in itself render finding clearly erroneous;

"judge's assessment of the weight and the credibility of the witnesses is entitled to deference"). There was no abuse of discretion. Adoption of Hugo, 428 Mass. at 225.

b. Nexus. The mother next contends that the judge erred in finding her unfit due to mental health issues because the evidence did not establish a nexus between her mental health issues and her parental shortcomings. Mental illness is relevant to the unfitness determination "once a nexus has been established between the illness and diminished parenting ability." Adoption of Saul, 60 Mass. App. Ct. 546, 554 n.11 (2004). Here, the mother's mental health was relevant as one among several factors supporting the judge's ultimate finding of unfitness. It contributed to the conflict in her relationship and detracted from her ability to create a safe and stable home environment for the children.

There is no dispute that the mother suffers from mental illness, as she herself has admitted to a diagnosis of bipolar disorder. Moreover there was ample evidence of the mother's violent and erratic behavior that directly demonstrated how her mental illness has impeded her ability to care for the children. Indeed, the mother made several suicidal and homicidal statements that specifically included threats to the children. As the judge noted, such threats are central to the children's feeling of safety and well-being and were of paramount concern.

See Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998) (judge "not bound to wait for a disaster to happen" to determine that children are in need of care and protection).

Significantly, the mother's mental health issues were not the only ones affecting her parenting. There was an extensive history of abusive relationships, unstable living conditions, erratic and volatile behavior, criminal activity, and failure to consistently participate in services -- all of which were properly considered for their predictive value on the question of future fitness and the likelihood of harm to the children.⁶ See Adoption of Elena, 446 Mass. 24, 33 (2006).

The judge addressed the fourteen factors relating to parental fitness set forth in G. L. c. 210, § 3 (c), and found that six applied to the mother (factors iii-vi, viii, and xii). For the reasons stated by the judge in her comprehensive findings of fact, conclusions of law, and orders, the ultimate determinations that the mother is unfit and that termination of her parental rights is in the children's best interests were well founded and appropriate.

⁶ Evidence of the mother's participation in parenting programs at the request of the department, without evidence of appreciable improvement in her ability to meet the needs of the children, does not undermine a finding of unfitness. See Adoption of Paula, 420 Mass. 716, 730 (1995).

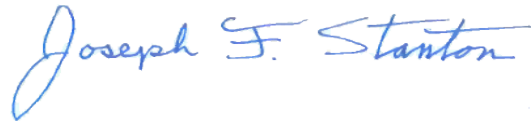
2. Posttermination visitation. Finally, the mother contends that the judge abused her discretion in ordering only one yearly visit between the mother and the children. "[T]he decision whether to grant post[termination] visits must be left to the sound discretion of the trial judge." Adoption of John, 53 Mass. App. Ct. 431, 439 (2001). A judge's decision to order posttermination contact must be "grounded in the over-all best interests of the child, based on emotional bonding and other circumstances of the actual personal relationship of the child and the biological parent, not in the rights of the biological parent nor the legal consequences of their natural relation." Adoption of Vito, 431 Mass. 550, 562 (2000).

Here, even if, as the mother suggests, there may be some evidence of a bond between the mother and the children, the judge was well within her discretion in fashioning the visitation order that she did. The nature of the threats the mother made regarding killing herself and her children posed a safety risk to the children. During supervised visits, the mother was unable to control her anger and emotions, going so far as to engage in assaultive behavior in the presence of the children. The mother also refused to accept referrals and engage in services to assist her in managing her emotional volatility and angry outbursts. We discern no error in the

judge's determination that limited posttermination contact was in the children's best interests. See id.

Decrees affirmed.

By the Court (Green, C.J.,
Meade & Singh, JJ.⁷),



Clerk

Entered: July 18, 2019.

⁷ The panelists are listed in order of seniority.